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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1975

No. 74-1393

THOMAS E. SINGLETON,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D.,

and

MICHAEL FREIMAN, M.D.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN C. DANFORTH
Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Counsel for Petitioner

MICHAEL L. BOICOURT
Assistant Attorney General

Of Counsel

KELLY PRESS, INC., 201 South Eighth Street, Columbia, Missouri Dial 449-4163

INDEX

Opinion Below 1

Jurisdiction 2

Questions presented 2

Statutory provisions involved 3

Statement of the case 4

Reasons for granting the writ 7

I. The Court of Appeals Erroneously Held That the Respondent-Physicians Had Standing to Assert the Unconstitutionality of Section 208.152(12), RSMo Supp. 1973, and, in So Doing, Rendered a Decision in Conflict with the Opinions of the Supreme Court on the Matter of Standing 7

II. The Court of Appeals Erroneously Determined That It Had Jurisdiction to Examine the Merits of This Case, Reaching the Constitutionality of a State Statute, Because the District Court Was Given No Opportunity Itself to Examine the Constitutionality of Section 208.152, nor Was the Petitioner Ever Given an Opportunity to Defend the Constitutionality of That Statute, And, to That Extent, the Determination by the Court of Appeals, on the Merits, That the Statute Was Unconstitutional So Departs From the Accepted and Usual Course of Judicial Proceedings as to Call For an Exercise of the United States Supreme Court's Power of Supervision 10

III. The Court of Appeals Erroneously Held Section 208.152(12), RSMo Supp. 1973, to Be Unconstitutional, and, in Doing So, the Court of Appeals Passed upon a Legal Issue Which Has Not Heretofore Been Determined in The United States Supreme Court but Which Should Finally Be Settled by This Court 14

IV. The Court of Appeals Erroneously Held That the State Must Provide Medical Payments for Non-Therapeutic Abortions If It Provides Medical Payments for Pregnancies Carried to Term or for Therapeutic Abortions Because the Effect of That Holding Is to Condition the Receipt of Federal Medicaid Funds upon State Subsidization of Non-Therapeutic Abortions Which Result Coerces the State into Making Payments for Non-Therapeutic Abortions in Contradiction to the Expressed Public Policy of the State of Missouri and Thereby Interferes with A Power Reserved to the State by the Tenth Amendment to the United States Constitution 17

Conclusion 20

Appendix 1 (Opinion and Judgment of Court of Appeals) 21

Appendix 2 (Opinion and Judgment of District Court) 31

CITATIONS

CASES

Page

Association of Data Processing Service Organizations v. *Camp*, 397 U.S. 150 (1970) 7

Bandy v. *U.S.*, 396 F.2d 929; cert. den. 393 U.S. 1004 (1968) 13

Barlow v. *Collins*, 397 U.S. 159 (1970) 8

Barrows v. *Jackson*, 346 U.S. 249 (1953) 9

Bruska v. *Missouri*, 332 F.Supp. 275 (E.D.Mo. 1971); aff'd. 405 U.S. 1050 (1972) 16

Doe v. *Bolton*, 410 U.S. 179 (1973) 2, 8, 15, 19, 20

Doe v. *Scott*, 321 F.Supp. 1385 (N.D.Ill. 1970), vacated 410 U.S. 950 (1973) 8

Equal Opportunity Commission v. *Standard Forage and Axel Co., Inc.*, 496 F.2d 1392 (5th Cir. 1974) .. 12

Eureka-Carlisle Company v. *Rottman*, 398 F.2d 1015 (10th Cir. 1968) 12

Fitts v. *U.S.*, 376 F.2d 516 (10th Cir. 1967) 12

Flast v. *Cohen*, 392 U.S. 83 (1968) 7, 8, 23

Gardner v. *Myers*, 491 F.2d 1184 (8th Cir. 1974) 13

Geduldig v. *Aiello*, —— U.S. ——, 94 S.Ct. 2485 (1974) . 16

Giordano v. *United States*, 394 U.S. 310 (1969) 12

Gonzalez v. *Automatic Employees Credit Union*, —— U.S. ——, 42 L.Ed.2d 249 (1974) 6, 11

Griswold v. *Connecticut*, 381 U.S. 479 (1965) 9

Holiday Magic, Inc. v. *Warren*, 497 F.2d 687 (7th Cir. 1974) 11

Johnson v. *Robinson*, —— U.S. ——, 94 S.Ct. 1160 (1974) 16

CASES

Page

Klein v. *Nassau County Medical Center*, 347 F.Supp. 496 (E.D.N.Y. 1972) 9

Kahan v. *Shevlin*, —— U.S. ——, 94 S.Ct. 1734 (1974) . 15

N.A.A.C.P. v. *Alabama*, 357 U.S. 449 (1958) 9

Nyberg v. *The City of Virginia*, 495 F.Supp. 1342 (8th Cir. 1974) 8

Ohio Municipal Judges Association v. *Davis*, 411 U.S. 144 (1973) 15

Roe v. *Wade*, 410 U.S. 113 (1973) 2, 8, 15, 19, 20

San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973) 15

Tileston v. *Ullman*, 318 U.S. 44 (1943) 9

Word v. *Poelker*, 495 F.2d 1349 (8th Cir. 1974) 8

Wulff v. *Singleton*, 508 F.2d 1211 (8th Cir. 1972) 15

MISCELLANEOUS

U.S. Const. art III 12

U.S. Const. amend. X 3

22 U.S.C. § 1395 17

28 U.S.C. § 1291 .....3, 12

28 U.S.C. § 2281 .....4, 12, 13

42 U.S.C. § 1396 17

45 C.F.R. § 205.10 (1973) 7

39 Fed. Reg. 237 13

Section 208.152, RSMo Supp. 1973 ..2, 7, 8, 9, 10, 11, 12, 13

Section 208.156, RSMo Supp. 1969 7

IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1975

No. _____

THOMAS E. SINGLETON,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D.,
and
MICHAEL FREIMAN, M.D.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Thomas E. Singleton, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on December 31, 1974.

OPINION BELOW

The opinion of the Court of appeals, reported at 508 F.2d 1211 (8th Cir. 1974), appears in the Appendix hereto. The opinion of the District Court for the Eastern District of Missouri also appears in the Appendix hereto. That opinion is reported at 380 F.Supp. 1137 (E.D.Mo. 1974).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on December 31, 1974. A timely petition for rehearing, requested by the respondents, was denied on January 9, 1975. On March 26, 1975, Justice Harry A. Blackmun, Associate Justice of the Supreme Court of the United States and Circuit Judge of the United States Court of Appeals for the Eighth Circuit, entered an order extending the time to file petition for writ of certiorari to and including May 8, 1975, and this petition for certiorari was filed within that extended time period. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether there is a logical nexus between the status of respondent-physicians and the claims they seek to have adjudicated sufficient to confer standing on them to challenge the constitutionality of Section 208.152, RSMo Supp. 1973.

2. Whether the Court of Appeals acted in excess of its jurisdiction when it proceeded to determine on the merits the constitutionality of Section 208.152, RSMo Supp. 1973.

3. Whether the decisions of the Supreme Court in *Roe* v. *Wade*, 410 U.S. 113, and *Doe* v. *Bolton*, 410 U.S. 179, compel the conclusion that a state must make Medicaid payments to eligible welfare recipients for non-therapeutic abortions.

4. Whether a state statute which provides medical assistance payments, as a family planning service, but excludes non-therapeutic abortions as a medical expense which the state will pay for as a family planning service, constitutes invidious discrimination if the state does provide medical assistance for pregnancies carried to term and for therapeutic abortions.

5. Whether a state may be compelled, given the restriction on federal power embodied in the Tenth Amendment to the United States Constitution, to choose between the equally objectionable alternatives of denying all Medicaid payments connected with pregnancy, thereby becoming ineligible to receive federal Medicaid grants, or of paying eligible welfare recipients Medicaid for non-therapeutic abortions contrary to the public policy of the state.

STATUTORY PROVISIONS INVOLVED

Section 208.152(12), RSMo Supp. 1973:

> "Benefit payments for medical assistance may be made on behalf of those eligible needy persons who are unable to provide for it in whole or in part, with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the division of welfare unless otherwise hereinafter provided, for the following:
>
> • • •
>
> (12) Family planning services as defined by federal rules and regulations; provided, however, that such family planning services shall not include abortions unless such abortions are medically indicated."

Title 28, U.S.C. Section 1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, ex-

cept where a direct review may be had in the Supreme Court. . . ."

Title 28, U.S.C. Section 2281:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. . . ."

STATEMENT OF THE CASE

On November 2, 1973, respondent-physicians filed a three-count complaint against petitioner Singleton, then designated as Chief of Bureau of Medical Services, Division of Welfare, Missouri State Department of Public Health and Welfare, and the State Board of Registration of the Healing Arts. Only Count II pertained to petitioner Singleton. In Count II, respondent-physicians challenged the validity under the United States Constitution of Section 208.152(12), RSMo Supp. 1973. That statutory section excluded non-medically indicated abortions from the range of medical assistance benefit payments, for family planning services, available to eligible needy persons. The complaint requested that the statutory section be declared in violation of the United States Constitution and that the enforcement thereof be permanently enjoined.

On December 12, 1973, respondent-physicians propounded four interrogatories to petitioner Singleton, which were answered on January 15, 1974 (except Interrogatory No. 4 to which objection was made).

On December 14, 1973, the petitioner Singleton's Motion to Dismiss was mailed for filing to the Clerk of the United States District Court for the Eastern District of Missouri. Petitioner Singleton stated four reasons why the complaint should be dismissed, including the following:

> "(2) That the plaintiff doctors do not possess the required standing to litigate the constitutional issues raised."

Attached to respondent-physicians' Memorandum in Opposition to Appellee Singleton's Motion to Dismiss, filed on February 18, 1974, are affidavits from each of the respondent-physicians.

The statutory three-judge court entered its Order and Judgment supported by a Memorandum on May 31, 1974, dismissing Count II of the Complaint on the ground that respondents lacked standing to challenge Section 208.152(12).

Seventeen days thereafter, on June 17, 1974, respondent-physicians filed a "Motion for Leave of Court to Add Parties Plaintiff", which was overruled on June 24, 1974.

Respondent-physicians duly filed their notice of appeal to the United States Court of Appeals for the Eighth Circuit on June 28, 1974.

On or about July 6, 1974, petitioner Singleton filed with the Court of Appeals his Motion to Dismiss Appeal on the ground that under 28 U.S.C. § 1253, appeal from a final order of a three-judge district court must be made to the United States Supreme Court. This motion was overruled on July 18, 1974.

The United States Court of Appeals for the Eighth Circuit issued its opinion reversing the decision of the District Court on December 31, 1974. The Court of Appeals found it had appellate jurisdiction pursuant to the United States Supreme Court's decision in *Gonzalez* v. *Automatic Employees Credit Union*, 42 L.Ed.2d 249, —— U.S. —— (1974), that the respondent-physicians had standing to adjudicate the constitutionality of the state statute in question; that the Court of Appeals had jurisdiction to reach the merits of the constitutionality of the state statute in question even though the petitioner had never filed an answer in the three-judge District Court below nor had an opportunity to brief or argue the constitutionality of the state statute under attack, and that the state statute in question was facially unconstitutional.

The respondent-physicians filed a motion for rehearing, asking for clarification and an award of attorneys' fees, on January 6, 1975. The Court of Appeals denied the motion for rehearing on January 9, 1975.

On January 31, 1975, the Court of Appeals denied petitioner's request for stay of mandate. Mandate issued on February 5, 1975.

Justice Blackmun granted petitioner an extension of time to file writ of certiorari to and including May 8, 1975, on March 26, 1975.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals erroneously held that the respondent-physicians had standing to assert the unconstitutionality of Section 208.152(12), RSMo Supp. 1973, and, in so doing, rendered a decision in conflict with the opinions of the Supreme Court on the matter of standing.

The three-judge District Court was correct in its determination that the posture of respondents in asserting the unconstitutionality of the state statute in question satisfied neither the standing requirement of *Flast* v. *Cohen*, 392 U.S. 83, 192 (1968), that there be a logical nexus between the status asserted by the complainant and the claim sought to be adjudicated, nor the requirement of *Association of Data Processing Service Organizations Inc.* v. *Camp*, 397 U.S. 150, 153 (1970), that the interest sought to be protected by the complaining party be within the zone of interests meant to be protected or regulated by the constitutional guaranty relied upon.

As emphasized by the District Court, Section 208.152 provides for the payment of medical assistance benefits "on behalf of those eligible needy persons who are unable to provide for it in whole or in part . . . ." Not only are payments made on behalf of eligible persons, but only the welfare recipient is granted a right to a hearing if the welfare recipient's claim for medical reimbursement is denied. A doctor is not granted a right of appeal. See Title 45, Code of Federal Regulations, Public Welfare, Chapter II, Section 205.10 (revised as of October 1, 1973), and Section 208.156, RSMo 1969. Therefore, eligible needy persons are the intended beneficiaries of Section 208.152; eligible needy persons are the people hurt by the operation of any restriction placed on the payment of medical assistance benefits be-

cause they are not provided the needed cost reimbursement; and welfare recipients are the ones given a statutory right to appeal adverse determinations. In determining the existence of standing, it is entirely appropriate that the Court consider whether the complainants asserting standing are the intended beneficiaries of the statute in controversy. *Barlow* v. *Collins,* 397 U.S. 159, 164-165 (1970).

Furthermore, respondent-physicians lack the kind of direct threat of personal detriment which is necessary to sustain their standing to challenge the constitutionality of Section 208.152 under *Flast.* This fact can be demonstrated on the basis of the very cases which the Court of Appeals cited in pages 3 through 5 of its opinion, which is appended hereto. For instance, in *Doe* v. *Scott,* 321 F.Supp. 1385 (N.D.Ill. 1970), vacated 410 U.S. 950 (1973), *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Doe* v. *Bolton,* 410 U.S. 179 (1973), the plaintiff-physicians were subject to the provisions of criminal anti-abortion statutes and, therefore, had the requisite direct threat of personal detriment to sustain their standing. In *Nyberg* v. *The City of Virginia,* 495 F.Supp. 1342 (8th Cir. 1974) and *Word* v. *Poelker,* 495 F.2d 1349 (8th Cir. 1974), regulations had been adopted the effect of which was to prohibit substantially and directly the granting of abortions, thus having a direct effect on a woman's right under *Roe* v. *Wade, supra,* to obtain an abortion and having a direct effect on a physician's right to practice medicine by performing abortions.

In the instant case, however, respondent-physicians are not subject to any criminal sanctions by the operation of Section 208.152, nor does Section 208.152 operate in such a manner as to prohibit respondent-physicians from performing abortions. Section 208.152 does not in any manner prohibit doctors from being paid for their services. The only effect that Section 208.152 has on respondent-physicians is to create some uncertainty as to the source of payment for abortion services rendered by them. No direct interest exists sufficient to create a logical nexus, under *Flast,* between the status asserted by respondents and the claimed unconstitutionality of the statute. In holding that the respondent-physicians have standing to assert the unconstitutionality of the state statute, the Court of Appeals contributed to an unwarranted and unjustified erosion of the Article III restrictions on federal courts' jurisdiction.

Likewise, the respondents cannot establish standing on the basis that they are representing the rights of their patients. Not having standing in their own right to challenge Section 208.152, respondents may not bring this action on behalf of their patients to protect their patients' fundamental rights. *Tileston* v. *Ullman,* 318 U.S. 44, 46 (1943).

The general rule under *Tileston,* that only those persons having constitutional rights should be able to assert those rights in the federal courts, can be avoided only where the complaining parties have clear and obvious standing on their own behalf as, for example, being subject to criminal prosecution, *Griswold* v. *Connecticut,* 381 U.S. 479, 481 (1965), or where the parties whose rights are to be represented cannot advance those rights on their own behalf as in *Barrows* v. *Jackson,* 346 U.S. 249, 257 (1953), and *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 459 (1958). In the instant case, as discussed above, the respondents do not have standing in their own right, are not subject to prosecution by reason of the existence of Section 208.152, and therefore cannot acquire standing under the exception of *Griswold* v. *Connecticut, supra.* Also, the indigent women which Section 208.152 was intended to benefit are fully able to advance their own rights. For example, in *Klein* v. *Nassau County Medical Center,* 347 F.Supp. 496, 498 (E.D.N.Y. 1972), all plaintiffs were pregnant at

the time they became plaintiffs; all plaintiffs had applied at different times for an abortion; all plaintiffs asserted that they could not afford abortions; all plaintiffs up to the time they filed suit had been unable to obtain an abortion; and all plaintiffs alleged that they were indigent.

The failure of the Court of Appeals to interpret correctly and adhere to the standing decisions of the Supreme Court justifies the grant of certiorari to review the judgment below, and, upon review of that judgment, the Supreme Court should reverse the Court of Appeals and declare that the District Court correctly held the respondent-physicians had no standing to assert the unconstitutionality of Section 208.152.

II

The Court of Appeals erroneously determined that it had jurisdiction to examine the merits of this case, reaching the constitutionality of a state statute, because the District Court was given no opportunity itself to examine the constitutionality of Section 208.152, nor was the petitioner ever given an opportunity to defend the constitutionality of that statute, and, to that extent, the determination by the Court of Appeals, on the merits, that the statute was unconstitutional so departs from the accepted and usual course of judicial proceedings as to call for an exercise of the United States Supreme Court's power of supervision.

When the District Court dismissed Count II of the respondent's complaint for their lack of standing to assert the unconstitutionality of Section 208.152(12), RSMo 1973 Supp., the respondents appealed that order of dismissal to the Court of Appeals. On the record before the Court of Appeals it was clear that the petitioner had never answered the respondents' complaint; that the constitutionality of the state statute had never been placed at issue in the District Court; that the District Court had never conducted a hearing or other inquiry into the constitutionality of the state statute on its face or as applied; that the District Court had not ruled upon the constitutionality of that state statute; and that the petitioner had never had an opportunity to brief or argue the constitutional merits of Section 208.152. Nevertheless, the Court of Appeals, once it found that the respondents had standing, proceeded to reach the merits. In doing so, the Court of Appeals acted in excess of its jurisdiction.

In effect, the Court of Appeals took unto itself original jurisdiction to determine the constitutionality of a state statute which issue had not been properly before, nor decided, by the District Court from which the appeal was taken.

Exclusive original jurisdiction is conferred upon three-judge district courts when a state statute or administrative order is challenged, a state officer is named as a party defendant, injunctive relief is sought, and it is claimed that the state statute or administrative order is contrary to the United States Constitution. *Holiday Magic, Inc.* v. *Warren,* 497 F.2d 687 (7th Cir. 1974); Title 28, U.S.C. § 2281. All of those elements were present in Count II of the Complaint filed by the respondents in the District Court. However, in the instant case, the District Court never considered the allegations containing those elements but ordered the dismissal of the lawsuit because the respondents had insufficient standing to sue. Although the entire three-judge court ordered the dismissal of Count II, a single judge could have entered an order dismissing the case for lack of standing. *Gonzalez* v. *Automatic Employees Credit Union,* —— U.S. ——, 42 L.Ed.2d 249 (1974). To that extent, the Court of Appeals was correct in finding that it had jurisdiction of the respondents' appeal from the order dismissing Count II of respondents' complaint. However,

a single-judge District Court could not have passed on those allegations of Count II qualifying the complaint for a three-judge District Court pursuant to Title 28, U.S.C. § 2281. Therefore, the Court of Appeals did not have jurisdiction to review the substance of respondents' Count II.

Article III of the United States Constitution grants unto Congress the power to establish and proscribe the jurisdiction of federal courts. Congress has provided that:

> "The courts of appeal should have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." Title 28, U.S.C. § 1291.

Hence, the Courts of Appeal have only appellate and no original jurisdiction. The constitutionality of Section 208.152, RSMo Supp. 1973, was not appealed to the Court of Appeals because the issue had never been determined by the District Court. Therefore, the Court of Appeals acted in excess of its jurisdiction when it reached the merits of this case because it did not have the requisite original jurisdiction to make such a determination.

It is well recognized that a Court of Appeals should not reach on appeal the merits of an issue on which a District Court has not ruled. *Equal Opportunity Commission* v. *Standard Forage and Axel Co., Inc.*, 496 F.2d 1392 (5th Cir. 1974); *Eureka-Carlisle Company* v. *Rottman*, 398 F.2d 1015, 1019 (10th Cir. 1968); and *Fitts* v. *U.S.*, 376 F.2d 516 (10th Cir. 1967). It is even more fundamental that constitutional questions should not be considered for the first time on appeal. *Giordano* v. *United States*, 394 U.S. 310, 312-313 (1969); *Bandy* v. *U.S.*, 396 F.2d 929, 930; cert. den.

393 U.S. 1004 (1968); *Gardner* v. *Myers*, 491 F.2d 1184, 1190 (8th Cir. 1974).

Once the Court of Appeals determined that the respondent-physicians had the requisite standing to sue, that court should have remanded the matter to the three-judge District Court for proceedings consistent with the Court of Appeals' finding. Present in Count II of the complaint which would then be before the three-judge District Court were all the elements necessary to invoke the jurisdiction of such a court pursuant to Title 28, U.S.C. § 2281. The petitioner would then have been afforded an opportunity to file his answer defending the constitutionality of Section 208.152 on its face or as applied, and to present evidence and legal arguments to the District Court to assist that court in making a fully informed determination as to the constitutionality of that state statute.[1] As the matter now stands, the Court of Appeals has abrogated the entire con-

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[1] For example, Section 208.152 excludes non-medically indicated abortions as a family planning service which will be publicly funded. Absent a District Court record the Court of Appeals could not have known whether abortion may or may not have been funded under a different category. Proposed federal regulations, not yet promulgated but printed at Vol. 39, Federal Register No. 237, would exclude all abortions from family planning services for which the federal government share is 90 percent. However, abortions would still qualify as a physician's service, the federal share of which is 60 percent. The Court of Appeals had no way of knowing the intricacies of how Section 208.152 was applied or if it absolutely prohibited medical assistance payments for abortion. Absent a defense by the petitioner and an evidentiary hearing by the court of original jurisdiction, the Court of Appeals had an insufficient record on which to base a constitutional decision.

gressional scheme of federal court jurisdiction. Certainly, if the District Court had made a determination concerning the constitutionality of the state statute, appeal should properly have been taken to the United States Supreme Court. It is entirely illogical to assume that a Court of Appeals could step into the case on the peripheral issue of standing and render a decision concerning the constitutionality of the state statute which decision has been reserved by Congress solely to a three-judge District Court and, on appeal, to the United States Supreme Court.

Because the action of the Court of Appeals in reaching the merits of this case constitutes such a drastic departure from the accepted and usual course of judicial proceedings, the United States Supreme Court should exercise its power of supervision and grant certiorari to review the judgment below.

III

The Court of Appeals erroneously held Section 208.152(12), RSMo Supp. 1973, to be unconstitutional, and, in doing so, the Court of Appeals passed upon a legal issue which has not heretofore been determined in the United States Supreme Court but which should finally be settled by this court.

There is no constitutional requirement that a state provide financial assistance for voluntary abortion as a condition of providing benefits for other medical treatment relating to pregnancy.

The opinion below announces a legal proposition as follows:

> ". . . the statute here provides medical payments if the pregnancy is carried to term or for therapeutic abortion but not if a non-therapeutic abortion is performed. This classification is a clear violation of the Equal Protection Clause of the Fourteenth Amendment."

Wulff v. *Singleton*, 508 F.2d 1211, 1215 (8th Cir. 1972). Page 8 of the opinion appended hereto.

We submit that there is no support whatsoever in the decisions of this Court for a holding that a state cannot finance necessary medical procedures unless it also agrees to finance procedures which are purely optional. *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), go no further than holding that voluntary abortion may not be made the subject of criminal sanctions when timely performed. It is quite another thing to say that a state must give financial assistance to an abortion simply because an indigent person chooses to have one.

The Equal Protection Clause prohibits only invidious discrimination. It does not enjoin differential treatment based on a reasonable classification in support of valid policy.

Thus a state may provide that local schools are to be financed substantially by local property taxes in spite of the wide variation of the taxing resources of the several districts. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973).

A state may permit in-term salary increases for judges of some courts which are denied to other judges. *Ohio Municipal Judges Association* v. *Davis*, 411 U.S. 144 (1973).

Widows may be afforded tax exemptions which are not available to widowers. *Kahn* v. *Shevlin*, —— U.S. ——, 94 S.Ct. 1734 (1974).

A state may exclude disabilities due to normal pregnancy in a disability insurance program while covering other disabilities of comparable duration including dis-

ability through abnormal pregnancy conditions. *Geduldig* v. *Aiello*, —— U.S. ——, 94 S.Ct. 2485 (1974).

A state may furnish textbooks or transportation to public school pupils without providing equivalent services for those who attend non-public schools, in spite of the constitutional permission for such aid. *Bruska* v. *Missouri*, 332 F.Supp. 275 (E.D.Mo. 1971); aff'd. 405 U.S. 1050 (1972).

The federal government is not required to provide veterans' benefits to conscientious objectors who elect alternate service. *Johnson* v. *Robinson*, —— U.S. ——, 94 S.Ct. 1160 (1974), decided under the "due process" analogy to the Equal Protection Clause.

In the above cases this Court has sustained differential treatment which is incidental to the effectuation of valid government policy. The details of the particular policy situations are not appropriate for discussion at this point. It is sufficient to say that there are valid reasons why a state may decide that, although voluntary abortions are permissible within certain time limits, the state does not choose to give positive assistance to the abortion process. Quite aside from the conviction that abortion is undesirable and to be discouraged, the state has a proper interest in the allocation of limited resources and facilities. The contrary holding of the Court below is in conflict with the approach of this Court in numerous cases, and an unwarranted interference with state policy. The conflict between the decision of the Court below and the decisions of this Court in equal protection matters justify the grant of certiorari to review the judgment below which judgment involves an issue which has not yet been determined by this Court but which should be.

IV

The Court of Appeals erroneously held that the state must provide medical payments for non-therapeutic abortions if it provides medical payments for pregnancies carried to term or for therapeutic abortions because the effect of that holding is to condition the receipt of federal medicaid funds upon state subsidization of non-therapeutic abortions which result coerces the state into making payments for non-therapeutic abortions in contradiction to the expressed public policy of the State of Missouri and thereby interferes with a power reserved to the state by the Tenth Amendment to the United States Constitution.

The Court of Appeals held that it was an unconstitutional classification for the State of Missouri to make Medicaid payments for pregnancies carried to term and for therapeutic abortions if Medicaid payments were not also made for non-therapeutic abortions. In effect, the decision of the Court of Appeals gave the State of Missouri one of two equally unsatisfactory options: either the State of Missouri must refuse to pay for all medical assistance connected with pregnancies at the expense of millions of dollars in federal Medicaid grants; or the State must make Medicaid payments for non-therapeutic abortions contrary to the public policy of Missouri.

Title 42, U.S.C. § 1396 conditions a federal grant to a state for medical assistance programs upon the submission, by the state, of an approved state plan for medical assistance. Title 42, U.S.C. § 1396 a.(10) (A) requires the state plan to provide for making medical assistance available to all eligible individuals. Title 42, U.S.C. § 1396 d.(a) (5) defines medical assistance as including physicians services. The term "physicians services" is defined by Title 22, U.S.C. § 1395 x.(q) as meaning ". . . professional services performed by physicians, including surgery, consultation,

and home, office, and institutional calls. . . ." In amplification of federal statutory language, Title 45, C.F.R. § 249.10, provides:

> "(a) *State Plan Requirements.*—A State plan for medical assistance under title XIX of the Social Security Act must:
>
> (1) Specify that at least the first five items of medical and remedial care and services as set forth in paragraph (b) (1) through (5) of this section will be provided to the categorically needy.
>
> • • •
>
> (b) *Federal Financial Participation.*—Subject to limitations in paragraph (c) of this section Federal financial participation is available and expenditures for medical or remedial care and services under the State plan which meet the following definitions:
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> • • •
>
> (5) *Physicians' services, whether furnished in the office, the patient's home, a hospital, a skilled nursing home or elsewhere.* 'Physicians' services' are those services provided, within the scope of practiec of his profession as defined by State law, by or under the personal supervision of an individual licensed under State law to practice medicine or osteopathy."

Petitioner Singleton has been administering the Division of Family Services of the Department of Social Services, in accordance with instructions passed on by federal administrators, on the premise that should the state plan fail to provide for prenatal services for eligible individuals choosing to carry a pregnancy to term, or if the state refused to pay for such services contrary to its state plan, that the State of Missouri would cease to be eligible for federal Medicaid grants. Using the present fiscal year as a

basis, this would cost the State of Missouri approximately 66 million dollars a year.

The decision by the Court of Appeals in conjunction with the provisions of Title XIX of the Social Security Act, and the rules and regulations promulgated thereunder, constitutes an unwarranted and unconstitutional intrusion by the federal courts and Congress into the internal affairs of the sovereign State of Missouri. The effect, *in toto*, of the Court of Appeals opinion and the statutes discussed above is to force the State of Missouri to fund publicly non-therapeutic abortions, against the public policy of the state as announced by its Legislature, because refusal to do so would forfeit all federal Medicaid grants.

The coercive nature of the Court of Appeals opinion, when combined with federal law and regulations, affirmatively conditioning the receipt by the State of Missouri of 66 million dollars in Medicaid funds upon the giving of non-therapeutic abortions, should not be tolerated in a federal system of government with powers and rights reserved to the states as independent political entities by reason of the Tenth Amendment to the United States Constitution.

There can be no doubt that the overall coercive effect of the Court of Appeals opinion and the federal Social Security Law will force the State of Missouri to abandon a long and deeply held internal policy totally against the concept of abortion except as necessary to save the wife or the mother. Prior to *Roe, supra,* and *Doe, supra,* the public policy of Missouri as expressed in statutory sections clearly demonstrated that abortion was against the public policy of the state. That position has not changed. Very recently, the State of Missouri became the first state in the union to pass a resolution requesting Congress to initiate those actions necessary to the creation of a constitutional amend-

ment taking abortion out from under the protection of the United States Constitution. Certainly, it is contrary to the Tenth Amendment if the federal government can induce, by the threatened termination of the entire Medicaid program in Missouri, the State to subsidize abortions contrary to the public policy created by the State Legislature.

The opinion by the Court of Appeals does not logically follow the decisions of this court in *Roe, supra,* and *Doe, supra.* It is a much different thing to say that a doctor cannot be legally prosecuted for performing an abortion requested by a pregnant woman than to say, as the Court of Appeals has done, that states must subsidize the abortion process with public funds.

The question of whether a state must publicly subsidize non-therapeutic abortions for eligible Medicaid recipients is one which has not been determined by the Supreme Court but which should be brought before this Court for final determination.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

JOHN C. DANFORTH
Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Counsel for Petitioner

MICHAEL L. BOICOURT
Assistant Attorney General

Of Counsel

APPENDIX 1

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 74-1484

GEORGE J. L. WULFF, JR., M.D. and MICHAEL FREIMAN, M.D.,

Appellants,

vs.

THOMAS E. SINGLETON, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,

Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: December 13, 1974
Filed: December 31, 1974

Before MATTHES, Senior Circuit Judge, ROSS and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

This appeal from the order of a statutory three-judge district court dismissing plaintiffs' cause of action for lack of standing raises troublesome questions of jurisdiction and procedure as well as a question concerning state interference with the abortion decision. The three-judge court opinion is reported as *Wulff* v. *State Board of Registration for Healing Arts,* 380 F. Supp. 1137 (E.D. Mo. 1974). We reverse.

Appellants, Missouri licensed medical doctors, brought

a three count complaint for declaratory and injunctive relief against the Missouri State Board of Registration for the Healing Arts and against Thomas E. Singleton in his capacity as Chief of the Bureau of Medical Services. The complaint challenged the constitutionality of state statute regarding welfare benefits, claiming that the statutory wording

> is vague and uncertain, deprives plaintiffs and their patients of the right to privacy, deprives plaintiffs of their right to practice medicine according to the highest standards of medical practice, deprives plaintiffs' patients of the fundamental right of a woman to determine for herself whether to bear children, infringes upon plaintiffs' right to render and their patients' right to receive safe and adequate medical advice and treatment, deprives plaintiffs and their patients of the equal protection of the law and due process of law, and constitutes state interference with the abortion decision, all of which is in violation of the United States Constitution.

380 F. Supp. 1137, 1139.

The three-judge court dismissed Count II of the complaint for lack of standing by the medical doctors to challenge the constitutionality of the statute. *See Wulff, supra* at 1144. Appeal was filed in this court.[1]

I. APPELLATE JURISDICTION

The portal question we have goes to the propriety of an appeal to this court from an order entered by a district court of three judges.[2]

---

[1] The appeal concerns only Count II of the complaint. Appellants do not challenge the district court's ruling on Counts I and III.

[2] 28 U.S.C. § 1253 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

That inquiry has been settled for us in the instant case by the United States Supreme Court's recent decision in *Gonzalez* v. *Automatic Employees Credit Union*, No. 73-858 (filed December 10, 1974), 43 Law Week 4025.

In *Gonzalez* appellant took his appeal directly to the Supreme Court from a three-judge court order dismissing the complaint for lack of standing. The court observed that when the basis of decision by a three-judge court is lack of standing, the case is such that "a single judge could have declined to convene a three-judge court" or "the three-judge court could have dissolved itself, leaving final disposition of the complaint to a single judge." *Gonzalez* at 4028 (footnote omitted). The Court went on to say:

> We hold, therefore, that when a three-judge court denies a plaintiff injunctive relief on grounds which, if sound, would have justified dissolution of the court as to that plaintiff, or a refusal to request the convention of a three-judge court *ab initio*, review of the denial is available only in the Court of Appeals.

43 Law Week 4025, 4028-29. This court has jurisdiction in the instant case.

II. STANDING

The district court found that there was no logical nexus between the status of appellant-physicians and the claims they sought to have adjudicated. *Flast* v. *Cohen*, 392 U.S. 83 (1968). We disagree.

This court made clear in *Nyberg* v. *City of Virginia*, 495 F.2d 1342 (1974), *cert. denied*, 95 S.Ct. 169:

> We think that the Supreme Court in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) has clearly paved the way for physicians

to assert their constitutional rights to practice medicine, which now includes the right to advise and perform abortions. • • •

• • •

Clearly the claims of medical doctors to "freely practice medicine according to the highest medical standards without arbitrary outside restraints" are inextricably bound up with the privacy rights of women who seek abortions, YWCA v. Kugler, 342 F. Supp. 1048, 1055 (D.N.J. 1972). This is sufficient to present a justifiable controversy and confer standing on the physicians who bring this action. *See* Griswold v. Connecticut, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Abele v. Markle, 452 F.2d 1121, 1125 (CA2 1971); stay granted, 409 U.S. 908, 93 S.Ct. 212, 34 L.Ed.2d 169 (1972), remanded for consideration in light of Roe and Doe, 410 U.S. 951, 93 S.Ct. 1417, 35 L.Ed.2d 683 (1973); Doe v. Turner, 361 F.Supp. 1288, 1289 (D.Iowa 1973) (3 judge court); Freeman & Bass, P. A. v. State of N.J. Com'n of Invest., 359 F.Supp. 1053, 1059 (D.N.J. 1973); *cf.* O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). Furthermore, the practical effect of the stringent limitation on the use of hospital facilities for performing abortions is to arbitrarily bar the physicians from activities that directly affect their economic interests. Abele v. Markle, *supra,* 452 F.2d at 1125; *see also,* Data Processing Service v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

We reiterated the same thought more succinctly in *Word* v. *Poelker,* 495 F.2d 1349, 1350 (8th Cir. 1974), where we said:

> It is now clear from the decisions in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed2d 201 (1973) that a sweeping regulation of the abortion decision and its implementation raises clear questions of constitutional dimension regarding a medical doctor's right to practice. Doe v. Bolton, *supra* at 188, 93 S.Ct. 739; Roe v. Wade, *supra* at 165 of 410 U.S., 93 S.Ct. 705. • • • .

See Orr v. *Koefoot,* 377 F. Supp. 673, 678 (D. Neb. 1974); *Poe* v. *Menghini,* 339 F. Supp. 986, 990 & note 8 (D. Kan. 1972); *Doe* v. *Scott,* 321 F. Supp. 1385, 87-88 (N.D. Ill. 1970); *see also Wounded Knee Legal Defense/Offense Committee* v. *F.B.I.,* No. 73-1908 (8th Cir., filed November 7, 1974), slip opinion at 6.

The statute in question interferes with the doctor-patient relationship as it relates to the abortion decision. It injects unnecessarily restrictive rules upon a constitutionally protected decision of doctor and patient as surely as did the statutes in the above cited cases. The statute interferes with the appellants' practice of medicine both professionally and monetarily.

We think that there is no question that (1) appellants allege that the challenged acts have caused them "injury in fact, economic or otherwise" and (2) "the interests sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150, 152-53 (1970). To hold otherwise in light of the authority cited above would defy logic. These medical doctors have standing to pursue this action.

III. THIS COURT'S JURISDICTION TO REACH THE MERITS

We are urged by appellants to reach the merits of this case rather than remand to the three-judge court. This question is not without its difficulty. There is little direct authority for the propriety of our reaching the merits. Nevertheless, we are satisfied that under the circumstances of this case and in the interest of judicial economy and logic we should now address the merits of this controversy.

Of course, the three-judge court has not determined the merits. This court is not generally a court of original jurisdiction. Even so, there is authority for the proposition that when a case is properly before a Court of Appeals, the court has the power "to do what plainly ought to be done." *Mercury Motor Express, Inc.* v. *Brinke,* 475 F.2d 1086, 1091 (5th Cir. 1973), *citing* 9 Moore's Federal Practice § 110.25[1] (2d ed. 1972).

In reaching the merits of a case which was before the court pursuant to an interlocutory appeal under 28 U.S.C. § 1292(b) this court said:

> We adhere to the proposition that it would be improper to consider "grave constitutional questions" where there exists "reasonable likelihood" that further proceedings could help clarify the issues. *Borden's Farm Products Co.* v. *Baldwin,* 293 U.S. 194, at 213, 55 S. Ct. 187, 79 L.Ed. 281. However, in the present proceeding no further pleadings or evidence is necessary for "refinement or clarification of the issues." *United States* v. *Petrillo,* 332 U.S. 1, 67 S. Ct. 1538, 91 L.Ed. 1877; *United States* v. *Fabro, Inc.,* M.D. Ga., 206 F. Supp. 523. And we should dispose of all controversies "as expeditiously as is consistent with proper judicial administration." *Turner* v. *City of Memphis,* 369 U.S. 350, 82 S. Ct. 805, 7 L.Ed.2d 762.

Board of Managers of Ark. Tr. Sch. for Boys v. *George,* 377 F.2d 228, 231 (8th Cir. 1967). In addition, Mr. Justice Clark in writing for the Supreme Court has indicated that effective judicial administration requires disposal of the case on appeal rather than remanding, where the point to be decided is clear. *Levin* v. *Mississippi River Fuel Corporation,* 386 U.S. 162, 170 (1967), 87 S. Ct. 927, 932.

It might be argued that the above authority, though persuasive, should not apply in the instance of an appeal to the Court of Appeals from a statutory three-judge court.

The Supreme Court has made it clear that the three-judge court mandate must be construed quite narrowly. "Congress established the three-judge court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge." *Gonzalez, supra* 43 Law Week 4027.

For this court to get to the heart of the matter and dispose of this case on the merits will not conflict with the policy behind the statute. Indeed, we think this case is particularly proper for disposition in this court since "[w]hile § 2281 calls for three judges to enjoin a statute 'upon the ground' of its 'unconstitutionality,' we [the Supreme Court] have held that three judges are not in fact necessary where the unconstitutionality of the statute is obvious and patent * * *." *Gonzalez, supra* at 4027, footnote 14, *citing Bailey* v. *Patterson,* 369 U.S. 31 (1962).

The statute in question is obviously unconstitutional, and it is our view that the case might well have been decided by one federal judge. *See generally Roe* v. *Norton,* 380 F. Supp. 726, 728 (D. Conn. 1974). Accordingly, we choose to make final determination of this case.

IV. MERITS

The statute before the court states:

Benefit payments for medical assistance may be made on behalf of those eligible needy persons who are unable to provide for it in whole or in part, with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the division of welfare unless otherwise hereinafter provided, for the following:

• • •

Family planning services are defined by federal rules and regulations provided, however, that such family planning services shall not include abortions unless such abortions are medically indicated.

As in *Word* v. *Poelker, supra* 495 F.2d 1349, 1350, the issue in this case concerns the facial constitutionality of the statute viewed against the glare of the Supreme Court's decisions in *Roe* v. *Wade, Doe* v. *Bolton,* and the precedent which has developed as a result of those cases.

We find it unnecessary to review again *Roe* and *Doe* or what this court has said in applying those cases. Suffice it to say that the statute here provides medical payments if the pregnancy is carried to term or for therapeutic abortions but not if a non-therapeutic abortion is performed. This classification is a clear violation of the Equal Protection Clause of the Fourteenth Amendment.

There is ample case authority for the holding that a welfare payments statute which places special regulation on abortion but not upon other medical procedures cannot stand in light of the Supreme Court decisions. *Doe* v. *Rose,* 499 F.2d 1112 (10th Cir. 1974); *Doe* v. *Westby,* ——F. Supp.——, No. 74-5017 (W.D. S.D., filed September 24,

1974); *Roe* v. *Norton,* 380 F. Supp. 726 (D. Conn. 1974); *Doe* v. *Wohlgemuth,* 376 F. Supp. 173 (W.D. Pa. 1974); *Doe* v. *Rompton,* 366 F. Supp. 189 (D. Utah 1973); *Klein* v. *Nassau Co. Medical Center,* 347 F. Supp. 496 (E.D. N.Y. 1972); *see also Doe* v. *Hale Hospital,* 500 F.2d 144 (1st Cir. 1974).

The control meted out by this statute does not give proper consideration to the conflicting constitutional interests involved. *Word, supra* at 1351. It is further invalid since the welfare parent and her physician are discriminated against by reason of the patient's poverty. *Compare, e.g., Klein, supra.*

We declare RSMo 208.152(12) to be unconstitutional on its face. Injunctive relief should be unnecessary. We assume that the state will abide by the ruling of this court and that medical assistance payments will be made on a nondisparate basis to those eligible needy persons who elect to carry their pregnancy to term or who receive therapeutic abortions and also to those who elect non-therapeutic abortions.

Reversed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX 2

UNITED STATES DISTRICT COURT

E. D. Missouri, E. D.

May 31, 1974.

GEORGE J. L. WULFF, JR., M.D., and MICHAEL FREIMAN, M.D.,
Plaintiffs,

vs.

The STATE BOARD OF REGISTRATION FOR the HEALING ARTS and THOMAS E. SINGLETON, Chief of Bureau of Medical Services, Division of Welfare State Department of Public Health and Welfare,
Defendants.

No. 73 C 731(A).

MEMORANDUM

This matter is before the Court on motion of defendant, State Board of Registration for the Healing Arts (hereinafter referred to as State Board), to dismiss Counts I and III of the plaintiffs' complaint, and on motion of defendant, Thomas E. Singleton, to dismiss Count II of plaintiffs' complaint. Counts I and III name the State Board as defendant and Count II names Thomas E. Singleton as defendant.

Plaintiffs, George J. L. Wulff, Jr. and Michael Freiman, are physicians licensed by the State of Missouri, engaging in the practice of obstetrics and gynecology. Defendant, State Board, is an administrative board created by Missouri state statutes charged with the licensing of physicians. The State Board has the power to revoke or suspend a physician's license for unprofessional and dishonorable conduct

under RSMo 334.100. Defendant, Thomas E. Singleton, is the Chief of the Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare, for the State of Missouri. In his capacity as Chief of the Bureau of Medical Services, Singleton oversees the applications, approvals, denials and payments of claims for payment and reimbursement of medical expenses arising from or related to the procedure of abortion for women eligible for Missouri State Medicaid assistance.

The plaintiffs' complaint for declaratory judgment and injunctive relief alleges jurisdiction in this Court under 28 U.S.C. §§ 1343, 2201, 2202, 2281, 2284 and 42 U.S.C. § 1983, and prays for the convening of a three-judge court under 28 U.S.C. § 2281, and for declaratory and injunctive relief in all three counts of their complaint.

Plaintiffs allege that the statutory wording "but excluding abortion" contained in RSMo 431.061[1] (Count I), "shall not include abortions unless such abortions are medically indicated" contained in RSMo 208.152 (Count II) and "pregnancy" contained in RSMo 431.061 (Count III) are unconstitutional. Plaintiffs allege that the above statutory wording in each count is vague and uncertain, deprives the plaintiffs and their patients of the right to privacy, deprives plaintiffs of their right to practice medicine according to the highest standards of medical practice, deprives plaintiffs' patients of the fundamental right of a woman to determine for herself whether to bear children, infringes upon plaintiffs' right to render and their patients'

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[1] 431.061. *Minors, treatment of certain conditions and diseases authorized.* Any physician, surgeon, any institution or facility of the state department of health, a municipal health department, or any public or private hospital may provide examination, treatment, hospitalization, medical and surgical care for any person under the age of twenty-one years, for;
(1) Pregnancy, but excluding abortion;
(2) Veneral disease;
(3) Drug or substance abuse including those referred to in chapter 195, RSMo 1969.

right to receive safe and adquate medical advice and treatment, deprives plaintiffs and their patients of the equal protection of the law and due process of law, and constitutes state interference with the abortion decision, all of which is in violation of the United States Constitution.

The contentions relied upon by the defendant State Board to sustain its motion to dismiss Counts I and III may be summarized as follows:

(1) Plaintiffs failed to state a claim upon which relief can be granted.

(2) The State Board is not a proper party defendant.

(3) Plaintiffs failed to allege the existence of a "controversy".

(4) Plaintiffs failed to allege enforcement by the State Board of the challenged statute and therefore the court should abstain from interpreting the state statute.

(5) There is relief available to plaintiffs in state courts and agencies.

The grounds relied upon by defendant Singleton to sustain his motion to dismiss Count II may likewise be summarized as follows:

(1) The declaratory relief prayed for does not constitute a "case or controversy ripe" for determination by this Court.

(2) Plaintiffs lack standing to litigate the constitutional questions presented.

(3) Injunctive relief cannot be granted in that the plaintiffs are not susceptible to irreparable harm by virtue of enforcement of the challenged statute.

(4) Plaintiffs have not exhausted administrative remedies.

(5) Plaintiffs could not personally suffer harm for which relief can be granted under 42 U.S.C. § 1983.

COUNT I

[1] RSMo 431.061 (see Footnote 1), which plaintiffs seek to attack in Counts I and III, was enacted in 1971 by the Missouri General Assembly as Section 1 of House Bill 73 and must be read and construed in connection with RSMo 431.062[2] and 431.063,[3] which were Sections 2 and 3 of House Bill 73. Mitchem v. Perry, 390 S.W.2d 600, 603 (Mo.App. 1965). When so read and construed it is apparent that RSMo 431.061 only relates to minors' ability to contractually bind themselves to pay for medical treatment for pregnancy, venereal disease and drug abuse. It is true that under RSMo 431.061(1) the treatment for pregnancy

[2] 431.062. *Minor cannot disaffirm contract, when—parents or guardian not liable, exception—disclosure by physician authorized, when*
Whenever a minor is examined, treated, hospitalized, or receives medical or surgical care under section 461.061:
(1) His consent shall not be subject to disaffirmance or revocation because of minority;
(2) The parent, parents, or legal guardian shall not be liable for payment for such care unless the parent, parents, or legal guardian has expressly agreed to pay for such care;
(3) A physician or surgeon may, with or without the consent of the minor patient, advise the parent, parents, or legal guardian of the examination, treatment, hospitalization, medical and surgical care given or needed if the physician or surgeon has reason to know the whereabouts of the parent, parents, or legal guardian. Such notification or disclosure shall not constitute libel or slander, a violation of the right of privacy or a violation of the rule of privileged communication. In the event that the minor is found not to be pregnant or not afflicated wih a venereal disease or not suffering from drug or substance abuse, then no information with respect to any appointment, examination, test or other medical procedure shall be given to the parent, parents, legal guardian or any other person.

[3] 431.063. *Minor's consent legally binding, when*
Any person, under the age of twenty-one years, who is examined, treated, hospitalized or who receives medical or surgical treatment under sections 431.061 to 431.063 may give legal consent, and no person who administers such medical or surgical treatment shall be liable, except for negligence, for treating such minor without advising the parent, parents, or legal guardian.

for which an unmarried minor may contractually bind herself excludes abortions. The effect of this exclusion is simply to leave the law unchanged as it relates to contracts for abortion. That is to say that a minor may not be held contractually liable for the cost of receiving an abortion unless she ratifies the debt contracted after she reaches majority. RSMo 431.060. This does not constitute a prohibition against giving abortions to minors.

[2] Neither the statute under attack, RSMo 431.061, nor the two statutes enacted as part of the same bill (RSMo 431.062 and 431.063) provide any sanctions for the performance of an abortion on an unmarried minor without parental consent. In fact, Missouri does not in light of Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), and Rodgers v. Danforth, Civ. No. 18360—2 (W.D.Mo.),[4] affirmed 1973, 414 U.S. 1035, 94 S.Ct. 534, 38 L.Ed.2d 327, at this time have sanctions for abortions performed on adults or minors as long as the abortionist is a licensed physician.

Plaintiffs contend in their affidavits filed in opposition to the defendants' motions to dismiss that they fear reprisals from the defendant State Board, in that the State Board may discipline them under RSMo 334.100 based upon their past performances of abortions and anticipated future performances of abortions upon unmarried minors, without parental consent, on a non-emergency basis. RSMo 334.100 provides, in part, that a licensee may be placed on probation or the license suspended or revoked when a physician is found guilty of unprofessional or dishonorable conduct. That statute then continues, stating:

"Without limiting the foregoing general language,

[4] See Appendix.

the following specifications shall be deemed unprofessional and dishonorable conduct within the meaning of this section:

* * * * * *

"(3) Committing an unlawful abortion;"

As pointed out above, since the decisions in *Wade, Bolton* and *Rodgers,* supra, and the failure of the Missouri Legislature to enact a statute within permissible limits of those cases, Missouri no longer has any prohibition against abortion, when it is performed by a physician. Therefore, any abortion performed by a licensed physician is not an unlawful abortion. What plaintiffs seek in reality is a declaratory judgment by this Court that the performance of an abortion by a licensed physician on an unmarried minor without parental consent on a non-emergency basis is not unprofessional and dishonorable conduct under RSMo 334.100.

In order for this Court to rule on the constitutionality of the statutory wording "but excluding abortion" in RSMo 431.061 under the Declaratory Judgment Act, 28 U.S.C. § 2201, as prayed for in plaintiffs' complaint, there must exist an "actual controversy" between the parties and without such actual controversy this Court is without power to grant declaratory relief. Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941). In Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956, 959, 22 L.Ed.2d 113 (1969), the Supreme Court said:

> "'[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues "concrete legal issues, presented in actual cases, not abstractions," are requisite. This is as true of declaratory judgments as any other field.' United Public Workers

> of America v. Mitchell, 330 U.S. 75, 89, [67 S.Ct. 556, 564, 91 L.Ed. 754] (1947). "The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, [61 S.Ct. 510, 512, 85 L.Ed. 826] (1941)."

[3, 4] From the foregoing, it is clear that the ingredients necessary to sustain a complaint for declaratory judgment are: (a) a substantial controversy; (b) between parties having adverse legal interests; and (c) the controversy must possess "immediacy and reality." The plaintiffs here do not claim that they have ever been threatened with disciplinary action by the State Board or that disciplinary action by the State Board is even likely. The most that can be said of the plaintiffs is that they feel uneasy or inhibited in performing abortions on minors without parental consent. The mere possibility or even probability that the plaintiffs may sometime in the future be adversely affected by a disciplinary action of the State Board not yet threatened does not create an "actual controversy" which is a prerequisite created by the clear language of the Declaratory Judgment Act. Garcia v. Brownell, 236 F.2d 356 (9th Cir. 1956), cert. denied, 362 U.S. 963, 80 S.Ct. 880, 4 L.Ed.2d 878 (1960).

COUNT II

In Count II plaintiffs challenge the constitutionality of the statutory wording, "shall not include abortions unless such abortions are medically indicated," contained in RSMo 208.152(12). The pertinent portions of RSMo 208.152 are as follows:

> "Benefit payments for medical assistance may be made on behalf of those eligible needy persons who are unable to provide for it in whole or in part, with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the division of welfare unless otherwise hereinafter provided, for the following:
>
> • • • • • •
>
> "(12) Family planning services are defined by federal rules and regulations provided, however, that such family planning services shall not include abortions unless such abortions are medically indicated."

[5] As established by the above statute, the medical reimbursements for medical assistance in the area of "medically indicated" abortions are made on behalf of those eligible needy persons who are unable to provide for it in whole or in part. Since the medical payments are made "on behalf" of the needy individual, there can be no argument but that the welfare recipient is the intended beneficiary of this statutory section. It is the welfare recipients and not their physicians who by Federal Title 45, Public Welfare Chapter II, Social Rehabilitation Services (Federal Register, Vol. 38, No. 157, Wed., August 15, 1973) under part 205.10(a)(5) are granted a right to a hearing if their claims for medical reimbursement assistance are denied and it is the welfare recipients who are afforded the right to appeal such decisions through the administrative process

required by federal regulation and established under RSMo 208.156. This raises the question as to whether the plaintiffs have standing to litigate the constitutionality of the statute here in question.

Plaintiffs state in their affidavits filed in opposition to defendant Singleton's motion to dismiss that they have provided and anticipate providing abortions to welfare patients who are eligible for Medicaid payments for medical assistance, and that those patients who have submitted applications for such payments have been refused and that they anticipate future refusals by defendant Singleton based upon the challenged language in RSMo 208.152. Plaintiffs further state that such refusals by defendant Singleton deter plaintiffs from the practice of medicine in the manner they consider to be most expert and beneficial to their patients.

Plaintiffs cite Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1970); Roe v. Wade, supra, and Doe v. Bolton, supra, as authority for their contention that they have standing to litigate the constitutionality of RSMo 208.152. Doe v. Scott, supra, was an action for declaratory and injunctive relief brought to declare an Illinois criminal abortion statute unconstitutional. The plaintiff-physicians in *Scott* alleged that the existence of the Illinois criminal abortion statute interfered with and adversely affected their ability to conduct their medical practices with proper regard for their patients' best interests. The district court in *Scott,* 321 F.Supp. l.c. 1387-88 held:

> "[T]he physician-plaintiffs have standing to raise the claims of their patients even if we assume that no independent claim of theirs could withstand a motion for judgment on the pleadings."

The court in *Scott* cited Griswold v. Connecticut, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and

Barrows v. Jackson, 346 U.S. 249, 257, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953), as supporting authority for its decision that the plaintiff-physicians had standing to raise the claims of their patients with respect to the constitutionality of the Illinois abortion statute.

In Griswold v. Connecticut, supra, the appellant-physician had been convicted as an accessory for giving information and medical advice on how to prevent conception in violation of a Connecticut statute making it a crime for any person to use any drug or article to prevent conception. In relation to the appellant-physician's standing, the Supreme Court said, 381 U.S. l. c. 481, 85 S.Ct. l. c. 1679:

> "We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship. Tileston v. Ullman, 318 U.S. 44 [63 S.Ct. 493, 87 L.Ed. 603], is different, for there the plaintiff seeking to represent others asked for a declaratory judgment. In that situation we thought that the requirements of standing should be strict, lest the standards of 'case or controversy' in Article III of the Constitution become blurred. Here those doubts are removed by reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute. Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be a crime."

In Barrows v. Jackson, supra, a white defendant who was a party to a racially restrictive covenant was being sued for damages by the covenantors because she had conveyed her property to Negroes. The defendant was allowed to raise the issue that enforcement of the covenant violated the rights of prospective Negro purchasers to equal protection of the law, although no Negro was a party to the suit.

The Supreme Court said, 346 U.S. l. c. 255-256, 73 S.Ct. l. c. 1034:

> "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party. Reference to this rule is made in varied situations. See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149-154 [71 S.Ct. 624, 636-639, 95 L.Ed. 817] (concurring opinion). The requirement of standing is often used to describe the constitutional limitation of the jurisdiction of this Court to 'cases' and 'controversies'. See Coleman v. Miller, 307 U.S. 433, 464 [59 S.Ct. 972, 986, 83 L.Ed. 1385] (concurring opinion). Apart from the jurisdictional requirement, this Court has developed a complementary rule of self-retraint for its own governance (not always clearly distinguished from the constitutional limitation) which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-348 [56 S.Ct. 466, 482-483, 80 L.Ed. 688] (concurring opinion). The common thread underlying both requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation. This principle has no application to the instant case in which respondent has been sued for damages totaling $11,600, and in which a judgment against respondent would constitute a direct, pocketbook injury to her."

The Supreme Court went on to say in relation to its rule on standing, l. c. 257, 73 S.Ct. l. c. 1035:

> "This is a salutary rule, the validity of which we reaffirm. But in the instant case, we are faced with a unique situation in which it is the action of the state *court* which might result in a denial of constitutional

rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained. Cf. Quong Ham Wah Co. v. Industrial Acc. Comm., 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190.

Roe v. Wade, supra, and Doe v. Bolton, supra, the other two cases relied upon by plaintiffs in the instant case to support their contention that they have standing, are somewhat similar in that they both attack the constitutionality of state criminal abortion statutes. In Roe v. Wade, supra, the Supreme Court held that plaintiff-physician in *Wade* was under indictment for violating the Texas criminal abortion statute and the Supreme Court dismissed his complaint and remitted him to his defenses in the state criminal proceedings against him where he could raise the constitutionality of the statute under which he was charged. In Doe v. Bolton, supra, the plaintiff-physicians alleged that the Georgia criminal abortion statute chilled and deterred them from practicing their profession. The Supreme Court in holding that the plaintiff-physicians had standing said, 410 U.S. l. c. 188, 93 S.Ct. l. c. 745:

> "[T]he physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted or threatened with prosecution, for violation of the State's abortion statutes. The physician is the one against whom these criminal

> statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."

In the instant case, the plaintiff-physicians have not been convicted as accessories to a criminal offense as the plaintiff-physician was in Griswold v. Connecticut, supra. The plaintiff-physicians here do not present a unique situation such as was presented to the court in Barrows v. Jackson, supra, and they are not being sued for damages as in *Barrows,* where a judgment against them would constitute a direct pocketbook injury. Also in *Barrows,* the Supreme Court felt it would be difficult if not impossible for the Negroes whose rights were being asserted by the defendant therein to present their grievance before any court. This is not the situation here for in the instant case the persons whose rights the plaintiffs are really asserting (their patients who are eligible to receive Medicaid payments) have a statutory right to a hearing before a state agency as stated above where they can present their grievance and if not satisfied they can carry their grievance on to the appropriate court. Neither are the plaintiff-physicians herein subject to the direct operation of any criminal anti-abortion statute as the plaintiff-physicians were in Roe v. Wade, supra, and Doe v. Bolton, supra, and, therefore, cannot assert a sufficiently direct threat of personal detriment as the plaintiff-physicians in those cases could. The only possible detriment the plaintiffs in the instant case can suffer under their contentions in Count II is the possibility that their patients who are eligible for medical assistance under RSMo 208.152 will not be able to pay for the services the plaintiffs have rendered to them in giving them an abortion operation.

Keeping in mind that it is the welfare recipient in whose behalf medical assistance payments under RSMo 208.152 are made and that it is the welfare recipients and not their physicians who have a right to a hearing if their medical assistance claims are denied, and that the plaintiff-physicians are not prohibited from performing abortions, this Court finds that the standing requirement of Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), that there be a logical nexus between the status asserted by the plaintiffs and the claim they seek to have adjudicated is not satisfied by the litigative posture of the plaintiff-physicians herein, and, therefore, they lack standing to challenge the constitutionality of the statute in question here. This is not to say that the issue the plaintiffs bring to this Court is not justiciable, but is only to say that these plaintiffs are not the proper parties to request an adjudication. Flast v. Cohen, supra.

COUNT III

[6] Plaintiffs contend that the word "pregnancy" in RSMo 431.061 is vague and ambiguous and *if* it is interpreted, construed and applied to exlude the giving, prescribing and providing of contraceptive devices to minors without parental consent then it would be subject to all of the constitutional defects alleged in Count I.

It is apparent from the plaintiffs' pleadings in Count III that the plaintiffs do not present an actual controversy in Count III as required under the Declaratory Judgment Act. Therefore, this Court's reasoning in relation to Count I and the law applied there equally applies here in Count III.

In view of this Court's findings it is not necessary to discuss the defendants' remaining contentions.

Accordingly, for the reasons above stated, the motion of the defendant, State Board, to dismiss Counts I and III for lack of controversy, and the motion of defendant Singleton to dismiss Count II for lack of standing, are sustained.

The Clerk of the Court will prepare and enter the proper order dismissing the case.

APPENDIX

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF
MISSOURI WESTERN DIVISION

Filed May 18, 1973

SAMUEL L. RODGERS, M. D., et al., *Plaintiffs,* vs. JOHN C. DANFORTH, Attorney General of the State of Missouri, et al., *Defendants.*	Civil Action No. 18360-2

MEMORANDUM OPINION AND JUDGMENT

This complaint attacked the constitutionality of Missouri criminal abortion statutes. The basic statute, Section 559.100, Missouri Revised Statutes, 1959, as amended, declares the production of all miscarriages and abortions a felony "unless the same is necessary to preserve her (the mother's) life or that of an unborn child," with different penalties for the death of a "quick" and "unquick" foetus. The complaint sought both declaratory and injunctive relief.

Because of the prayer for injunctive relief, a three-judge federal court was convened under the provisions of Title 28, U.S.C. Section 2281.

A motion to intervene was filed by "Baby Doe" and an M.D. on behalf of all unborn children "who will or may be adversely affected by the action before this court."

The defendant named in the original complaint was

the Attorney General of Missouri, in his official capacity, and later, by an amended complaint, the Prosecuting Attorney of Jackson County, Missouri, was added as a party defendant, who was made the class representative of all prosecuting attorneys in Missouri, by subsequent court order.

The Court then granted the motion of the defendants to dismiss this action on the sole grounds of abstention, and ordered the cause dismissed without prejudice. The plaintiffs appealed this judgment to the Supreme Court.

While the appeal was pending, that Court decided the cases of Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), and remanded this case to this Court "for further consideration in light of" these two cases.

After the remand, the defendants filed an answer denying the existence of a justiciable controversy and alleging that the attacked statutes are justified by compelling state interests, to-wit: the protection of human life and the protection of potential human life. The answer requested a jury trial under either Rule 38 or 39, Federal Rules of Civil Procedure.

The plaintiffs filed a motion for summary judgment based on affidavits of two of the plaintiffs who are medical doctors, and a third person who is Executive Director of Suicide Prevention, Inc., a United Fund agency in St. Louis.

The denfendant Attorney General has filed lengthy suggestions in opposition to the motion for summary judgment, accompanied by the affidavit of an M.D. which controverts affidavits filed by plaintiffs as to the "chilling effect" of Missouri abortion statutes on the practice of their profession by doctors in Missouri.

The argument of the Attorney General of Missouri is that in Roe v. Wade, *supra,* the Supreme Court did not determine "whether an unborn child is human life"; that this is a question of fact which can only be determined by triers of the fact after hearing evidence from expert witnesses; that if human life exists from the moment of conception the State has a compelling interest to protect this life; and that summary judgment cannot be granted when such an issue of fact exists.

This Court finds that the teachings of Roe v. Wade, *supra,* completely contradict this argument. The opinion stated that the "existence of life from the moment of conception" is the official belief of the Catholic Church, of many non-Catholics, and "a view strongly held . . . by many physicians."

But, the opinion states, "We need not resolve the difficult question of when life begins." No statement could be clearer. Whether life begins at conception, at quickening, at viability, or at birth (the alternatives discussed in the opinion), the Court held that resolution of this question would not affect the decision.

The defendants' prayer for trial of the factual issue of "when life begins" is denied.

The lack of justiciable controversy issue raised by the answer is fully discussed and ruled upon in the case of Doe v. Bolton, *supra.* That case holds:

> "We conclude, however, that the physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes."

Four of the plaintiffs in this case are eminent Missouri-licensed obstetricians and gynecologists, and their standing as plaintiffs, under the teachings of Doe v. Bolton cannot be questioned.

In Roe v. Wade the Court quoted from the Texas statute it found unconstitutional and stated, "Similar statutes are in existence in a majority of the States.[2]" Footnot 2 lists "Mo.Rev. § 559.100 (1969)."

There can be no question that this Missouri statute referred to in that opinion is unconstitutional under the teachings of the two Supreme Court cases which we were mandated to consider. The other two statutes attacked are based upon the validity of § 559.100 and must similarly be held unconstitutional. The plaintiffs' motion for summary judgment will be granted.

In both Roe v. Wade and Doe v. Bolton the Supreme Court affirmed the lower court's granting of a declaratory judgment and denial of injunctive relief, stating in both cases that the Court would assume that the state prosecutorial authorities would give full recognition and credence to the Court's judgment as to the unconstitutionality of the State statute.

In this case the defendant Attorney General has not given "full recognition" or "credence" to the ruling of the Supreme Court. It does not appear that a declaratory judgment in this case, in view of the Attorney General's publicly stated position, will suffice to guarantee the constitutional rights of pregnant women and their consulting doctors as decided by the Supreme Court, and, it is therefore

Ordered that the defendant Attorney General of the State of Missouri, and the defendant class of all Prosecuting Attorneys in the State of Missouri be, and they hereby are, enjoined from instituting any criminal prosecutions, com-

plaints for warrants, or complaints for search warrants under, or by authority of, unconstitutional Sections 542.380(3), 559.100, or 563.300, Revised Statutes of Missouri, 1969. Costs taxed to defendant Attorney General in his official capacity.

(s)
Floyd R. Gibson, Circuit Judge

(s)
Elmo B. Hunter, District Judge

(s)
William R. Collinson, District Judge